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ABSTRACT

This report provides results of the Select Committee on Indian Affairs' consideration of a bill to improve the education status of Native Hawaiians through grants to the University of Hawaii; community colleges; the Hawaii Department of Education; and Native Hawaiian organizations for educational programs, curriculum development, preschool education centers, and special education. The Committee recommends that the bill be passed with an amendment establishing a native Hawaiian Gifted and Talented Center. The report includes the following information: (1) information on purpose and background of, and need for, the bill; (2) analysis of the legal and historical relationship between the Federal government and Native Hawaiians; (3) summary of the major provisions of the bill; (4) legislative history of the bill; (5) explanation of the Committee Amendment; (6) section-by-section analysis of the bill as amended; and (7) several letters in support of and opposing the bill. (PS)

100TH CONGRESS
1st Session

SENATE

REPORT
100-36

IMPROVING THE EDUCATION STATUS OF NATIVE HAWAIIANS, AND FOR OTHER PURPOSES

APRIL 9 (legislative day, MARCH 30), 1987.—Ordered to be printed

Mr. INOUYE, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 360]

The Select Committee on Indian Affairs, to which was referred the bill (S. 30) to improve the education status of Native Hawaiians, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

AMENDMENT

On page 8, beginning on line 8, delete all through line 16 on page 9 and insert the following in lieu thereof:

SEC. 6. (a) The Secretary shall establish a Native Hawaiian Gifted and Talented Center located at the Universtiy of Hawaii at Hilo, and shall make grants to and enter into contracts with the University of Hawaii at Hilo and/or the Kamehameha Schools/Bernice Pauahi Bishop Estate for demonstration projects designed to address the special needs of Native Hawaiians gifted and talented elementary and secondary school students and their families. The grantees shall be authorized to subcontract where appropriate, including with the Children's Television Workshop.

(b) Demonstration projects under this section may include—

(1) the identification of the special needs of gifted and talented students, particularly at the elementary school, level, with attention to the emotional and psychosocial needs of these individuals and their families;

(2) the conduct of educational psychosocial and developmental activities which hold reasonable promise of resulting in substantial progress toward meeting the educational needs of such gifted and talented children, including, but not limited to, demonstrating and exploring the use of the Native Hawaiian language and exposure to Native Hawaiian cultural traditions;

(3) the use of public television in meeting the special educational needs of such gifted and talented children;

(4) leadership programs designed to replicate programs for such children throughout the State of Hawaii, and to other Native American peoples, including the dissemination of information derived from the demonstration projects conducted under this section; and

(5) appropriate research, evaluation and related activities pertaining to the needs of such children and their families.

(c) The Secretary shall facilitate the establishment of a national network of Native Hawaiian and American Indian Gifted and Talented Centers, and ensure that the information developed by these centers shall be readily available to the education community at large.

(d) In addition to any other amount authorized for such projects, there is authorized to be appropriated $1,000,000 for fiscal year 1988 and for each succeeding fiscal year through fiscal year 1993. Such sums shall remain available until expended.

PURPOSE

S. 360 authorizes supplemental education programs to benefit Native Hawaiians. The Secretary of the Department of Education is authorized to make grants to the University of Hawaii, community colleges, the Hawaii Department of Education, the Kamehameha Schools/Bishop Estate * and Native Hawaiian organizations for various types of educational programs, including implementation of model educational curricula and the establishment of family based preschool education centers. Also included are programs in the areas of higher education, gifted and talented, and special education. The total authorization for FY 1988 for all the programs is $9.9 million, distributed as follows:

Curriculum Development	$3,000,000
Family Education Centers	2,400,000
Higher Education	2,000,000
Gifted and Talented	1,000,000
Special Education	1,500,000
Total	9,900,000

* Princess Bernice Pauahi Bishop, the last of the Kamehameha royal family, was the great-granddaughter of King Kamehameha the Great, who united the Hawaiian Islands. On her death, her estate, mostly land holdings, was conveyed to a trust established for the education of Hawaiian children. The Bishop Estate administers the Kamehameha Schools through a court-appointed board of trustees. Currently, nearly 3,000 Hawaiian children, from preschool to high school, attend Kamehameha Schools.

BACKGROUND AND NEED

This bill is the culmination of years of effort that began in 1977, in the 95th Congress, with the introduction of three bills to include Native Hawaiians in educational, financing and contracting programs that serve American Indians. The focus has twice shifted back and forth on the question of whether or not to include Native Hawaiians in federal programs enacted for American Indians. While there is certainly logic and historical validity to this approach, the reaction from the Indian community has been rather consistently negative. Tribal education leaders are concerned that the inclusion of Native Hawaiians will further erode the already scarce funding available for Indian programs, funding which has been significantly decreased during the Reagan years.

The new effort envisioned in S. 360 attempts to deal in a categorical way with the severe educational needs of Native Hawaiians. Over 20 percent of the students in Hawaiian public schools are Native Hawaiians, who constitute the second largest ethnic group. However, even as early as the preschool years, Native Hawaiians are at an educational disadvantage: over 67 percent of entering kindergarten children score below the norm, compared to the national average of 23 percent. An estimated 37 percent of Native Hawaiian elementary students score in the lowest scoring groups and 12 percent in the highest groups; nationally, 23 percent score in each group. About 75 percent of preschoolers entering kindergarten at the Kamehameha Schools have hearing impairments severe enough to interfere with learning. In the 9th grade, only one-third of the Native Hawaiian students aspire to a four-year college education while 50 to 75 percent of their peers have such hopes. Native Hawaiian children make up 35 percent of the students in Hawaii who are identified as having learning disabilities. Only 7 percent of the students enrolled at the University of Hawaii are Native Hawaiians.

Not only in educational achievement, but in other socioeconomic indicators as well, Native Hawaiians continue to rank lower than other ethnic groups in Hawaii. This bill attempts to address the education needs in a comprehensive, logical progression, by providing a range of educational programs, from prenatal counseling through higher education scholarships and fellowships. Also included are programs designed to serve gifted and talented children and children with mental or physical handicaps.

The Historical Development of S. 360: The genesis of S. 360 was in 1977 when S. 857 was introduced to include "Native Hawaiians" in the definition of "Indian" for several federal education programs, including the Elementary and Secondary Education Act, the Adult Education Act, the Indian Education Act and the Impact Aid Act. After hearings, the bill was amended to establish new sections of these public laws authorizing educational programs specifically for Native Hawaiians. The bill passed the Senate but the House took no action.

In 1979, a bill identical to S. 857, as amended, was introduced in the 99th Congress: S. 916, like S. 857, set up Hawaiian Education programs modeled on programs designed for Indians. The bill passed the Senate as part of the 1980 Education Amendments but

the Senate provisions were deleted in conference. Congress then agreed to a House substitute provision creating an Advisory Council on Hawaiian Education.

Funds for the new Council were rescinded by the 1981 Omnibus Budget Reconciliation Act. The Senate Appropriations Committee then instructed the Ofice of Education to submit a comprehensive report on Native Hawaiian education, the costs of which were underwritten by Kamehameha Schools/Bishop Estate. In July of 1983, the final report was published, entitled "Native Hawaiian Education Assessment Project" (NHEAP). In March of 1984, the Select Committee on Indian Affairs conducted an oversight hearing on NHEAP in Washington, D.C. The report validated certain assumptions, namely that Native Hawaiians score below parity in education and this low achievement is directly related to their cultural situation.

In 1985, S. 830 was introduced to amend various laws authorizing education programs for American Indians and Alaska Natives by including Native Hawaiians and by setting aside 25 percent of the funds for this purpose. A hearing was held in June, 1986, in Washington, D.C., where testimony from the Indian community did not support any set aside from Indian program funding for Native Hawaiians.

In January 1987, S. 360, was introduced by Senators Inouye and Matsunaga. This bill received the unanimous support of the National Congress of American Indians at its Executive Board meeting on March 10, 1987, in Washington, D.C.

Power and Responsibility of Congress to Legislate for Native Hawaiians: Section 1(1) of S. 360 states that Congress finds that the federal government retains the legal responsibility to enforce the administration of the State of Hawaii's public trust responsibility for the betterment of the conditions of Native Hawaiian people; subsection (2) states that Congress has the power to specially legislate for the benefit of Native Hawaiians. The Committee has been on record since 1978 affirming that Congress does have such power and responsibility and once again reiterates that position. (See Senate Reports 95-1199 and 96-318).

The question of providing services to a distinct group of Native Hawaiians arises when comparison are made between Native Hawaiians and American Indians. While the political/historical relationship between Native Hawaiians and the U.S. is not identical to that between the U.S. and Indian tribes, in some ways they are parallel. The similarities are many: both groups lost most of their homelands and their sovereignty over such lands to European conquerors. In turn, both Indians and Hawaiians became minorities in their own countries and their numbers were decimated by white man's diseases. Significantly, both groups are at the bottom of virtually all the charts of socioeconomic indicators—health, education, income, job status, etc.

While the similarities are many, including the fact that the U.S. made and broke treaties with governments of Indian tribes as well as the Hawaiian Kingdom, the differences are important too: those American Indian tribes which survivied as units have kept intact tribal governments which are still recognized as sovereign by both the federal and state governments. Hawaiians were self-governing

until 1893, when the government of Queen Liliuokalani was overthrown in an insurrection engineered by a group of western businessmen who sought the annexation of Hawaii to the United States. The U.S. minister to Hawaii ordered the landing of U.S. marines and sailors and recognized the new provisional government even before the Queen's defeneses had surrendered. It was 4 years before the U.S. government accepted annexation and in 1898, Hawaii became a U.S. territory.

The economic conditions of the Native Hawaiians deteriorated and, in 1920, the U.S. Congress legislated directly for their benefit by enactment of the Hawaiian Homes Commission Act. The Act extablished a 200,000 acre land base for Native Hawaiians for homes, ranches and farms. The lands are administered by a Commission composed entirely of persons of Hawaiian ancestry. When the Act was before the Congress, one of the issues considered was whether Congress has the power to legislate for the benefit of Native Hawaiians. At that time, the Solicitor of the Department of the Interior provided an opinion upholding Congress' power to enact legislation for Native Hawaiians under its power to legislate for the benefit of Indians in general. A similar conclusion was reached by the Attorney General of the territory of Hawaii.

When Hawaii became a state in 1959, the responsibility to administer the Hawaiian Home Lands Commission was transferred to the State of Hawaii but Congress retained the sole authority to amend the essential terms of the Act, as well as for enforcing the Act. There is, therefore, a continuing trust obligation on the part of the U.S. that is vested in Congress to make sure the Hawaiian lands are properly managed for Native Hawaiian people.

The power of Congress to legislate for Hawaiians has been exercised through several different laws passed by Congress: Native Hawaiians are eligible for programs operated by the Administration for Native Americans, for job training programs at the Labor Department, and for Vocational Education, Adult Education, and Library Services programs through the Department of Education.

Just as the U.S. government was created without consent of the Indian tribes, so was Hawaii made a U.S. territory without consent of its Native population. Just as treaties and executive orders reserved to Indian tribes certain aboriginal lands for their exclusive use and benefit, so the Hawaiians Homes Commission Act ceded original Hawaiian lands back to Native Hawaiian people for their exclusive use and benefit. In the Committee's view, therefore, Congress retains a trust relationship to Native Hawaiians. The memorandum printed below details the legal underpinnings of this relationship.

ANALYSIS OF THE LEGAL RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND NATIVE HAWAIIANS

The following analysis of the legal relationship between the United States government and Native Hawaiians was prepared at the request of the Committee:

MEMORANDUM

To: The Senate Select Committee On Indian Affairs.
Re: The Nature Of The Federal-Native Hawaiian Relationship.
From: Paul Alexander, for the Kamehameha Schools/Bernice Pauahi Bishop Estate.

Summary

The Federal Government has a trust relationship to Native Hawaiians. The relationship is premised on the course of dealings of the United States and its citizens with Native Hawaiians and their government, the explicit recognition of the relationship by the United States Congress in establishing the Native Hawaiian Home Lands Commission, the recognition of the special status of Native Hawaiians in Hawaii Statehood Act, and the recognition by the federal courts of the relationship. While most commentators agree that a trust relationship exists, there is little agreement as to the exact nature of the obligations implicit in the relationship. It is probable that until Native Hawaiian issues are addressed on a comprehensive basis, such as they have been to some extent for many Indians and Alaskan Natives, the extent of the trust relationship for Native Hawaiians will remain unsettled. What is clear, however, is that Congress does possess the authority, pursuant to the Federal-Native Hawaiian relationship to enact legislation that is rationally related to the purposes of the trust relationship—to legislate for the benefit of Native Hawaiians.

The Hawaiian question

The issue of the nature of the Federal-Hawaiian Native relationship usually occurs in one of two contexts: (1) whether the relationship has been such that Native Hawaiians have a legal and/or moral basis for claims against the United States; or (2) whether the relationship is such that it justifies the provision of federally funded services to Native Hawaiians. The weight of opinion in Hawaii with respect to the issue of claims is definitively affirmative. Although many of the underlying events and legal analysis relating to claims are relevant to the issue of services, this paper only addresses the services issue.

The services question has sometimes been phrased as whether Native Hawaiians are "Indians" for the purposes of the Federal trust relationship, and whether therefore they can be included within any of the various programs that have been developed for Indians. While a number of legal arguments can be constructed to address the question of whether Native Hawaiians are legally the same as Indians; [1] these formulations do not clearly address the underlying issue. When Congress has determined that a trust relationship exists for an "indigenous group" within its political boundaries, Congress has the authority and the power to determine the

[1] The argument is based on applying considerations set out in Cohen's *Handbook of Federal Indian Law, infra*, n. 8, that "singly or jointly, have been relied upon in reaching the conclusion that a group constitutes a tribe" of Indians. These include the treaties between the U.S. and Hawaii; recognition of Hawaiians as an aboriginal group in various Congressional Acts; collective rights in rights in land under the Hawaiian Homes Commission Act; and recognition of Hawaiian Natives as an aboriginal group by other Native groups. *Contra*, Price v. State of Hawaii, 764 F.2d 623 (9th Cir. 1985) applying recognition criteria to a specific Hawaiian entity.

perimeters of the social service aspect of that relationship. Whether services for Native Hawaiians should be identical to Indian services, provided through the same delivery systems, or different delivery systems, or a mix thereof, become policy issues. Issues that most likely will be influenced by the particular needs being addressed and the determination of the most effective delivery mechanisms that can be utilized to meet those needs. The key question is therefore—is there an identifiable Federal-Native Hawaiian relationship.

In addressing the above question it is helpful to review the Federal-Indian relationship and how it relates to the provision of social services. Much of the relevant law and underlying concepts concerning trust relations were formed to justify land transactions between Indian tribes first with the colonial European powers, then with the colonies, and finally with the United States. There are functional and legal analogies to be drawn between the Indian experience in North America, and the Native Hawaiian experience in dealings with the Western-European Colonial powers, the Republic of Hawaii, and the United States. The analogies are striking. What is also striking is the similarity of consequences. Both Indians and Hawaiians were left with a fraction of their original lands, and with severe social and economic consequences.

Services and the Federal-Indian relationship

A key concept of the Federal-Indian Relationship is the Federal trust responsibility. Chief Justice John Marshall in two related cases, *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1 (1831), and *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), described Indian tribes as "domestic dependent nations" and characterized the relationship of the United States to the Indian tribes as one that "resembles that of a ward to his guardian." The responsibility to deal with Indians was constitutionally assigned to the Federal Government. This responsibility has become universally known as "the trust relationship." It is important to note that the responsibility has never been fully defined. Because a concrete definition of the trust responsibility might fail to take into account changing conditions and changing needs, the relationship can be described but not defined with any exactness. Indian people tend to define the trust as the responsibility that the Federal Government assumes from the operation of International law, the Constitution, treaties and practice for the property and the well-being of Indian people.[2] There are both mandatory and permissive aspects of the trust relationship. Because of the Federal-Indian relationship, the U.S. must exercise certain fiduciary standards with respect to Indian property. The existence of the relationship is also the basis for the provision of services that are not necessarily mandatory. The difference between what is a trust right and what is a trust-based service, often the subject of hard fought political and legal battles, is only occasionally a key issue in the actual delivery of services.[3] In what

[2] See, e.g. U.S. Congress, American Indian Policy Review Commission, Final report of the American Indian Policy Review Commission (Washington, D.C.: U.S. Government Printing Office, 1977)

[3] See White v. Califano, 437 F. Supp. 543 (D.S.D. 1977), *aff'd* 581 F.2d 697 (8th Cir. 1978) and McNab v. Heckler, N. CU-83-051-GF (D. Mont. 1986).

can be labeled the "trust mandated" or trust right situation, the beneficiaries can hold the trustee accountable, either in terms of monetary damages or equitable enforcement. In what can be termed the trust-based situation, Congress can provide distinct services to Indians; services that are insulated from challenge under the equal protection standards of the fourteenth amendment and similar standards incorporated in the fifth amendment to the Constitution.[4] Although Indians may not be able to require the United States to maintain a particular service or to provide damages for its withdrawal, in the trust-based situation, the existence of the trust does require the government observe certain due process procedures in the provision of such services that may not be otherwise required of a discretionary social service program.[5]

Indian people tend to assert that many of the social services that are provided, such as health and education, are services mandated by the trust responsibility. The Executive Branch often argues that most Indian services are at best premised on the trust responsibility but are not required (trust-based). It argues that only services associated with trust property are the "true" trust services. Congress which constitutionally has the power to determine the extent of the trust, generally avoids the issue of determining whether any particular service is required by the trust relationship.[6] These issues are only infrequently addressed by the Courts, and when they are, they come up in unique factual situations, so that the issue of what services are trust rights or simply trust based is likely to remain unsettled. However, it is clear under *Morton* v. *Mancari* that in order for the federal government to provide programs to a distinct class of persons—Indians—the government purpose in the program need only be rationally tied to the United States' trust obligation to such Indians.

There is a third class of services to which Indian tribes and people have access. These generally are services that are created by Congress to meet a defined social need and Indians are included as one of the many beneficiary groups. Although the trust relationship provides a basis for defining Indians as an eligible class in the general legislation, usually along with a determination of need, analytically such programs are neither trust mandated services, nor strictly speaking services based on the trust responsibility.

Services and the Federal-Native Hawaiian relationship

Unless Congress clearly established that a particular service is a right under the trust relationship, e.g. the Hawaiian Homes Commission Act, the federal services provided to Hawaiian Natives usually fall within the categories of trust-based services or eligible class services.

To date, Congress has legislated for the benefit of Native Hawaiians in the below listed programs:

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[4] Morton v. Mancari, 417 U.S. 535 (1974).

[5] See e.g. Fox v. Morton, 505 F.2d 254 (9th Cir. 1974); Vigil v. Andrus 667 F.2d 931 (10th Cir. 1982); and Wilson v. Watt, 703 F.2d 395 (10th Cir. 1983).

[6] But see, The Indian Health Care Improvement Act findings which state: ". . . health services to maintain and improve health of Indians are consonant with and required by the Federal government's historical and unique relationship with, and result in responsibility to, the American Indian people." 25 U.S.C. sec. 1601.

Hawaiian Homes Commission Act, 42 Stat. 108 (1921) provides homesteads to Native Hawaiians.

Leases in Hawaii National Park made available to Native Hawaiians, 16 U.S.C. sec. 396a (1938).

Native Hawaiians made an eligible class for services under the Administration for Native Americans, P.L. 93-644 (1974).

Native Hawaiians made an eligible class for services under the Comprehensive Employment Training Act, P.L. 93-203 (1977).

Native Hawaiians included as a covered class in the Indian Religious Freedom Act, 42 U.S.C. sec. 1966 (1978).

Native Hawaiians included as a eligible class for services under the National Institute on Drug Abuse, 21 U.S.C. sec. 1177(d) (1980).

A Native Hawaiian Study Commission was authorized, 94 Stat. 3321 (1980).

Native Hawaiians included as a eligible class for services under the Job Training Partnership Act, P.L. 97-300 (1982).

Secretary of Health and Human Services directed to conduct a comprehensive study of the health care needs of Native Hawaiians, P.L. 98-396 (1984).

Native Hawaiians included as eligible class for services in Carl D. Perkins Vocational Education Act, P.L. 98-524 (1984).

Native Hawaiians included as an eligible class for services under Library Services and Construction Act Amendments, P.L. 98-480.

Native Hawaiians included as a eligible class for whom priority was provided in Institutional Aid programs in Higher Education pursuant to the Conference Report on Fiscal Year 1985 Appropriations for the Departments of Labor, Health, and Human Services, and Education, Conf. Rept. No. 98-1132, (1985).

Native Hawaiians included as a eligible class for whom priority was provided in the creation of Parental-Child Development Centers pursuant to the Conference Report on Fiscal Year 1985 Appropriations for the Departments of Labor, Health, and Human Services, and Education, Conf. Rept. No. 98-1132, (1985).

Native Hawaiians included as eligible class for services in Anti-Drug Abuse Act of 1986, P.L. 99-750 (1986).

Grant authorized for Native Hawaiian Culture and Arts Development Program in Higher Education Amendments of 1986, P.L. 99-498 (1986).

The basis of the Federal-Hawaiian Native relationship

Most commentators and courts that have explored the question of the Federal-Hawaiian Native trust relationship have concluded that although the perimeters are not defined, as they are also not completely defined for Indians, such a trust relationship exists.[7] It is based on the dependency of the indigenous Hawaiian Natives, and the recognition by the United States Congress of that status in the annexation of Hawaiian Islands, the establishment of the Hawaiian Homes Commission, and the Hawaiian Admissions (statehood) Act.

[7] The Hawaiian Study Commission majority report acknowledges a "very limited special trust" and the minority report argues for a broader trust. Either view would support rationally related services.

Felix Cohen's Handbook on Federal Indian Law [8] is the most prestigious and comprehensive treatment of legal theory and case pertaining to Native Americans in the field. The 1982 edition says of Native Hawaiians:

> . . . they are a people indigenous to the United States . . . however . . . they have not been dealt with comprehensively by Congress.
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> * * * * *
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> . . . the full extent of the trust obligation owed by the United States to Native Hawaiians and the manner of its fulfillment has not been fully defined.[9]

The Congressional Research Service in response to a request from Senator Inouye reviewed the question and concluded:

> The courts have upheld the power of Congress to single Indians out for special treatment because of their unique status under the Constitution and treaties, and have inferred a trusteeship obligation on the part of the United States toward the aboriginal people that constitute the original inhabitants of lands now within the borders of the continental United States. . . . The same reasoning that was used to infer a trust relationship between the United States government and the Indian tribes would seem to be capable of being applied to the relationship with Native Hawaiians.[10]

Several federal courts and the Supreme Court of Hawaii have had to address the issue of whether a trust relationship exists for Native Hawaiians and all have concluded that it does. Perhaps the most misunderstood case in the area is *Keaukaha-Pananewa Community Association* v. *Hawaiian Homes Commission,*[11] known as *Keaukaha I.* This case considered whether a group of Native Hawaiians had standing as private parties to bring suit in federal court under the Hawaiian Homes Commission Act and/or the Hawaiian Admissions Act to prevent the Commission from transferring certain trust lands. Although the Court was clear that a trust for the benefit of Native Hawaiians had been established by these Acts, the administration of which was primarily with the state of Hawaii, the Court determined that a Federal question did not exist and that state court was the proper forum. In reaching that conclusion the 9th Circuit stated:

> It is clear, however that for all practical purposes these benefits have lost their federal nature.[12]

It has been suggested that this dicta of the 9th Circuit may be a barrier to asserting a Federal-Hawaiian Native Trust relationship. The statement or dicta should be understood in the context of *Keaukaha I* being a case pertaining to availability of remedies, not

[8] 1982 Edition.
[9] *Ibid,* at 797-798.
[10] November 2, 1983 memorandum from the Congressional Research Service, Library of Congress, to Senator Daniel K. Inouye, *Definition of Native Hawaiians,* at 1-2.
[11] 588 F.2d 1216 (9th Cir. 1978).
[12] Ibid, at 1226.

a case defining rights. The unavailability of a currently viable remedy does not negate the fact that a right exists. Paradoxically, rights and remedies do not necessarily run together. It is quite clear in federal Indian law that many Indian "rights" have been what Justice Frankfurter once termed "hortatory". Special acts of Congress have been required to vindicate such rights.[13] The fact that a number of Indian rights currently require remedies in State forums rather than Federal forums does not convert the Federal Indian right into a State right.[14]

A more recent case involving the identical underlying factual issues and parties as *Keaukaha I,* known as *Keaukaha II* [15] determined that the trust relationship reflected in the Hawaiian Homes Commission Act and the Hawaiian Admissions Act was a federal right enforceable under the 42 U.S.C. Sec. 1983, a reconstruction era civil rights statute. This decision should end any confusion over Hawaiian rights that remained under *Keaukaha I.* Section 1983 actions are premised on the deprivation under the color of state law of a federal right. The Federal right required for the application of section 1983 is the finding that the Hawaiian Admissions Act clearly "mandates the establishment of a trust for the betterment of native Hawaiians."

The Supreme Court of Hawaii in *Ahuna* v. *Department of Hawaiian Home Lands,* 64 Haw. 327, 640 P. 2d 1161 (1982) also has addressed the issue of Federal-Hawaiian Native Trust relationship in order to determine the obligations of the Hawaii State Department of Hawaiian Home Lands in administering the lands that had been set aside by Congress for Native Hawaiians in the Hawaiian Homes Commission Act. The Court determined that: (1) the legislative history of the Hawaiian Homes Commission Act indicates that the United States "stood in a trusteeship capacity to the aboriginal people" of Hawaii; and (2) the primary purpose of the Act "was the rehabilitation of native Hawaiians". The Hawaiian Supreme Court then utilized Federal-Indian law to determine the state agency's fiduciary obligation, as the instrumentality for effectuating the Federal purpose.

Also implicit in the *Ahuna* decision is the determination that special programs for the benefit of Native Hawaiians are not a constitutionally suspect racial discrimination. The applicable principles of analysis are from Indian law. The U.S. Supreme Court determined in *Morton* v. *Mancari* [16] a federal employment preference for Indians was not unconstitutional racial discrimination, but rather a reasonable exercise of federal discretion to implement its trust relationship with Indians. Indians for the purpose of the trust relationship are not a "race", but rather what has been termed a political classification. Case law indicates that programs, functions or services need only be "rationally related" to the purposes of the trust to pass constitutional muster.[17]

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[13] The establishment of the Indian Claims Commission was in direct response to the inability to otherwise pursue claims.

[14] See e.g., P.L. 83-280 which permitted states to assume specified jurisdiction over Indians.

[15] Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 739 F.2d 1467 (9th Cir. 1984).

[16] *Morton* v. *Mancari,* 417 U.S. 535 (1974).

[17] *Delaware Tribal Business Council* v. *Weeks,* 430 U.S. 73 (1977).

The Attorney General of the State of Hawaii had to address the question of potential unconstitutional discrimination when the State of Hawaii established the Office of Hawaiian Affairs, all of whose trustees must be Native Hawaiians, and elected by Native Hawaiians. Utilizing Indian law principles, the Attorney General of Hawaii in a written advisory opinion, (Opinion No. 80-8, July 8, 1980) determined that the Office of Hawaiian Affairs was a rational means of effectuating the state's obligations under the trust relationship to Native Hawaiians. This judgment is consistent with federal and state judicial decisions sustaining state action that are carried under federal authority to further the Federal trust responsibility.[18]

The historical relationship

A review of the history of relations between Hawaiian Natives and the United States demonstrates that there are significant parallels to aspects of U.S.-Indian history and gives credence to the observations of the commentators and the Courts that a Federal-Native Hawaiian Relationship exists.

It is been estimated that approximately 300,000 native people occupied the "Sandwich Islands," as Hawaii was then called when Western society discovered them in 1778. The indigenous Hawaiians had a complex political and economic but self-sufficient system is existence at time of contact. The system has been compared to the feudal system of medieval Europe. Private property—fee simple title—did not exist. Land occupancy rights ran from greater lords to lesser lords to commoners; obligations ran in reverse order.[19] Major differences did exist: land use rights were personal and did not necessarily pass to heirs; and "commoners" were not tied to the specific lords or land and could move. Each island was autonomous until 1810 when Kamehameha I united the islands by conquest and negotiation.

Certain similarities to the Indian situation at the time of discovery are pertinent. Both populations were politically autonomous, and both populations were self-sufficient in their traditional economies and life styles. Neither population had a private property system; but they did however control most, and in some cases all, of the lands within their political boundaries.

All of these situations would change. The various ways that Indian lands have been alienated from Indian ownership has been documented in proceedings of the Indian Claims Commission, and other sources. Interestingly, treaties which have become a major source of evidence in establishing a trust relationship, were often the instruments of land loss. The role of the United States in these transactions was fairly clear, it either directly obtained the Indian land or failed to protect the tribes in their land dealings.

The role of the United States in the Hawaiian loss of land was different in form than in the Indian situation but just as central. Treaties with the Native Hawaiian government were not generally land transactions but were means of assuring commercial access.

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[18] See, R. Johnson and E.S. Crystal, Indians and Equal Protection, 54 Wash. L. Rev. 587 (1979).

[19] N. Levy, Native Hawaiian Land Rights, 63 Cal. L. Rev. 848 (1975) provides an extensive discussion of these matters and is relied upon throughout this paper.

The first treaty of peace and friendship proposed in 1826 was not ratified by the United States.[20] The first ratified treaty (1849)[21] dealt with friendship, commerce and navigation. A second treaty was entered into in 1875; dealing with commercial reciprocity.[22] A final treaty, also concerning commercial reciprocity was entered into in 1884.[23] Throughout the 19th century, it would be the American merchants along with American missionaries who under the auspices of "civilizing" a system they felt was culturally inferior to their own would intervene with the military support of the United States government in internal Hawaiian affairs. This active intervention first focused on access to Hawaiian commercial timber, then after the trees were depleted, switched to access to the land itself for the establishment of the plantation economy that would dominate Hawaii in the second half of the nineteenth century. This interference would find early expression in the western style constitution of 1840 and culminate in an insurrection against the Hawaiian monarchy.

During the first half of the 19th century, the merchants were supported by their respective Governments (French, British and American) by the use of naval war ships.[24] In effect the Westerners, and eventually the United States, using the threat of military force reduced the Kingdom of Hawaii to the functional equivalent of a dependent sovereign—a suzerainty.

The influence of the western powers was greatly felt in the land system:

> By 1845, the land tenure system could neither maintain itself in the face of a hostile foreign world or accommodate itself to the wishes of that world.[25]

A land Commission dominated by Westerners was appointed. It would oversee the "Great Mahele"; the end of the traditional Hawaiian land system and the substitution of a more western style system of fee ownership. Cohen points out that:

> By destroying the interlocking communal nature of land tenure its [the Great Mahele] effect was similar to allotment and termination acts on the mainland.

Land rights were concentrated in the hands of the very few. The King and the chiefs held title to 99 percent of all the lands. Many of the commoners who lived on the land were not permitted a realistic opportunity to obtain title to their lands. In a process not dissimilar to that which occurred with Indian lands after allotment, title to much of land was soon transferred to non-Hawaiian ownership. Large plots of lands owned by royalty no longer had communal obligations attached and were therefore not productive without western capital or management systems. They were sold off at "distress prices" and fraud was not uncommon; ultimately a plantation

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[20] Treaty with Hawaii on Commerce, Dec. 23, 1826, United States-Hawaii, 3 C. Bevans, Treaties and Other Internal Agreements of the United States, 1776–1949, at 861 (1971).
[21] Treaty with Hawaii on Friendship, Commerce and Navigation, Dec. 20, 1849, U.S.-Hawaii, 9 Stat. 977.
[22] Treaty with Hawaii on Commercial Reciprocity, Jan. 30, 1875, U.S.-Hawaii, 19 Stat. 625.
[23] Treaty with Hawaii on Commercial Reciprocity, Dec. 6, 1884, U.S.-Hawaii, 25 Stat. 1399.
[24] Levy, *supra*, n.16 at 852.
[25] *Ibid*, at 853.

economy with imported non-Hawaiian labor was firmly established. Small plots were also uneconomical and most were soon lost.

All commentaries seem to agree that in the second half of the 19th Century a small number of Westerners (2000) came to control most of the land in Hawaii:

> Native Hawaiians had been excluded from the mainstream of the economy; they had lost ownership of most privately held land and had been reduced to a minority of the inhabitants of the Kingdom.[26]

Control of land, however, was not enough. The Westerners who by the latter part of the nineteenth century were primarily Americans, sought political control. As noted previously the first Hawaiian constitution of 1840 was procured by western influence. The constitution of 1887, known as the "Bayonet Constitution" was forced on the Monarchy by armed merchants—American citizens. This constitution restricted the right to vote to those who paid taxes, including non-citizens. Native Hawaiians were disenfranchised and the American merchants obtained a virtual dictatorship.

At this point, although legally part of a foreign state, the American merchants felt that they were "part of the American system"; a view publicly echoed by U.S. Secretary of State Blaine. However, the imposition of the "McKinley tariff" on foreign sugar (including Hawaiian sugar) created a significant economic crisis. Sugar fell from $100 a ton to $60 a ton and property values collapsed in Hawaii.[27]

The last royal ruler of Hawaii, Queen Liliuokalani, came to the throne in 1892 and attempted to replace the "Bayonet constitution" with a new one that would have significantly eroded western power. Foreigners were to be precluded from obtaining citizenship or from voting. In January 1893, shortly before the new constitution was to go into effect, and while President Harrison, who favored annexation, was still in office, armed American merchants, aided by the U.S. minister in Hawaii, John L. Stevens, and marines from the U.S.S. *Boston* forced the Queen to relinquish her governmental authority.

A provisional government dominated by American merchants was established. This government immediately sought annexation by the United States. The goal of annexation, however, would take a few years. Assuming office shortly after the overthrow of the Queen, President Cleveland, supported by the Blount report [28] refused to support annexation.[29] The Blount report found that the overthrow of the Queen had been illegal; and recommended that she be restored to power. The Provisional government of Hawaii refused to follow Blount's recommendations and instead established

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[26] Cohen, *supra*, n.8, at 800.

[27] S. Morrison and H.S. Commanger, The Growth of the American Republic 5th Ed., Vol. 2 (1962).

[28] James Blount was the former Chairman of the House of Representatives Committee on Foreign Affairs, appointed as Special Commissioner to Hawaii. See, Kuykendall, *The Hawaiian Kingdom, The Kalakaua Dynasty* (1967) for an in depth treatment of this era in Hawaiian affairs.

[29] President's Message Relating to the Hawaiian Islands, H.R. Exec. Doc. No. 47, 53rd Cong., 2d Sess., XIV-XV (1893).

the Republic of Hawaii. The Republic thereupon took over all crown and government lands without compensation.

Another report on the overthrow of the Queen and the propriety of annexation would be prepared by the Senate Foreign Relations Committee; it is known as the Morgan Report.[30] The Morgan Report approved the United States support of the merchants. It used a familiar theory . . . determining Hawaii to be a dependent sovereignty of the United States, an analogous theory to that used in the landmark decisions that gave judicial recognition to the Federal-Indian relationship, *Worcester* and *Cherokee Nation.* The report stated:

> [It] is a recognized fact that Hawaii has been all the time under a virtual suzerainty of the United States . . . a de facto supremacy over the country.

A "suzerainty" was understood in International law to be the relationship that a more powerful sovereign has over a dependent one; the dependent sovereign was usually viewed as less "civilized" than the powerful sovereign.

After the Morgan Report, by a joint resolutoin of Congress the United States annexed Hawaii in 1898.[31] Cohen states that with annexation "Native Hawaiians became a dependent indigenous people of the United States." [32]

Native Hawaiian conditions which were stressed at the time of annexation continued to deteriorate. Indian conditions were at same time also suffering from similar circumstances; loss of traditional life styles and food resources; loss of the native land base; and destruction of traditional modes of self-government. By the 1920's, reformers were concerned about the conditions of Native people. For Indians, the Red Cross survey of conditions, and the Meriam Commission report would result in a partial reversal of many of the policies of the 19th century.

For Hawaiians Natives the concern would focus in the Hawaiian Homes Commission Act.[33] The Act set aside 200,000 acres of land to be leased at nominal rates for 99 years to Native Hawaiians. Congress viewed the Hawaiian Homes Commission as a "plan for the rehabilitation of the Hawaiian Race." The bill was introduced by the nonvoting Delegate from Hawaii, J.K. Kalanianole, a member of the royal family of Hawaii, based on a plan developed by Senator Wise of the Legislative Commission of the Territory of Hawaii.

The Hawaiian Homes Commission Act also addressed another concern prevalent at the time. This was the concern of many of "growers" whose long term leases on their plantations were expiring, that under the homesteading laws applicable in the territories, that much of "their land" could be lost to homesteading. These bundreds of thousands of agricultural acres were removed from the Homesteading provisions.

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[30] S. Rep. No. 227, 53rd Cong., 2d Sess. (1893).
[31] 30 Stat. 750 (1898).
[32] Supra, n. 8, at 802.
[33] 42 Stat. 108 (1921).

Hawaiians were thought to be a dying race, numbering a scant 22,500 in 1920. The House Committee Report [34] on the Homes Commission quotes from the hearing record to establish the cause of the problem it was attempting to remedy.

> Secretary [of the Interior] LANE. One thing that impressed me . . . was the fact that the natives of the islands who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers, and many of them are in poverty . . .
>
> * * * * *
>
> Mr. MONAHAN. What caused this dying away of the race . . .
>
> Secretary LANE. . . . It is always incident to the comings of civilization and we always carry disease germs with us to which these people are not immune . . .

The Committee's response to any challenge to the bill's constitutionality as "unconstitutional class legislation" was to point out, among other arguments, that Congress had the authority to provide special benefits for unique groups such as "Indians, soldiers and sailors . . .". This is the same argument in embryonic form, that the Supreme Court would later use in *Morton* v. *Mancari* to sustain special programs for Indians. The Hawaiian Homes Commission Act is universally viewed as Congress' recognition of the special relationship the United States has to Native Hawaiians.

When Hawaii became a state in 1959, the dominant federal-Indian policy was then the termination of Indian Reservations and the transfer of much Federal administrative responsibility to States. It is therefore not surprising that the Hawaiian Homes Commission was made part of the responsibilities of the State of Hawaii upon Hawaii's admission to the union. Since the rights involved were Federal, Federal responsibility was retained. Any changes proposed by the State that could impair Hawaiian Native rights require Congressional consent, and the United States is the only party with specific standing to sue in federal courts to enforce the provisions of the trust.[35]

Another important provision was also included in the Admission Act that demonstrated Congress' denotation of Native Hawaiians as a special beneficiary group. That provision required the State of Hawaii to utilize the income and proceeds from lands the United States ceded to Hawaii for the benefit of the people of Hawaii, and specifically Native Hawaiians. Again the United States retained a supervisory trustee role.[36]

Since statehood Congress has periodically legislated for the benefit of Native Hawaiians.[37] It has not, however, comprehensively addressed Hawaiians Native issues. This situation is not entirely different from the Federal-Indian relationship, which also has not been comprehensively spelled out. Many of the Indian programs are premised on general statutory authority. The Executive branch

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[34] H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920).
[35] P.L. 86-3, set out in full in 48 U.S.C. prec. sec. 491.
[36] 73 Stat. 4, sec. 5(f) (1959).
[37] See the discussion on pages 6-7.

has been allowed great latitude in defining the nature and scope of programs.[38] Absent an express direction from Congress, the agencies operating federal programs have not included Hawaiian Natives. Although it is possible administratively feasible to include Hawaiian Natives, given the broad discretion asserted by federal agencies, inclusion of the Hawaiian Native population in federal programs by agency action is not very likely. Department of the Interior regulations on tribal recognition apply only in the continental United States and therefore exclude Hawaiians.[39] Furthermore much agency activity in the last decade has focused on reducing beneficiaries by narrowing eligiblity criteria.

In many ways, native Hawaiian issues resemble those of Native Alaskans prior to the Alaskan Native Claims Settlement Act. In addressing the issue of whether "Eskimos" were "Indians" even though not of the same racial origin, courts have determined that the term "Indians" is not a racial classification but a term of art for the aboriginal peoples of America.[40] Alaskan Natives were sometimes included in Indian programs, although not always. Periodically programs were passed for Alaskan Natives that did not have Indian counterparts.[41] Alaskan Natives with several exceptions did not have reservations or trust lands. In addition to resolving Alaskan land claims, the Settlement Act provided for a comprehensive definition of Alaskan Natives, and the creation of a series of entities, including existing traditonal Native villages, as the mechanisms for land holding as well as service delivery. These mechanisms have no counterpart in Indian affairs in the lower-forty eight states, but have become routine parts of the Federal-Alaskan Native relationship.

Many distinct issues, and many divergent views exist on the subject of Hawaiian Land Claims. Absent such a comprehensive approach to Hawaiian issues, as was provided for Alaskan Natives by the Alaskan Natives Claims Settlement Act, or some other comprehensive mechanism, Congress will determine on a by-case basis whether any particular program should be part of the Federal-Hawaiian relationship. As Cohen has stated ". . . there is no reason to doubt that Congress has power to legislate specifically for the benefit of Native Hawaiians."[42]

SUMMARY OF MAJOR PROVISIONS

S. 360 was drafted in response to concerns well-expressed by Senator Matsunaga: "It has been said that a rising tide lifts all boats. As our great nation and state head into the 21st century, we cannot afford to leave behind any segment of our population." The Native Hawaiian population of this nation is in danger of being left behind, according to NHEAP and other studies that show Native Hawaiians are below the national norms for most socioeconomic indicators.

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[38] Morton v. Ruiz, 415 U.S. 199, 231 (1974) "the power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left implicitly or explicitly by Congress."

[39] 25 C.F.R. 54.2.

[40] Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976)

[41] For example the importation of Reindeer for benefit of Alaskan Natives, 25 U.S.C. sec 500.

[42] Supra, n. 8, at 803.

The reports also confirms that the educational needs of Hawaiians are directly related to their unique cultural environment. Only sensitivity to that culture can bring about positive change. Research shows that when Native Hawaiian children are given the opportunity to learn by use of culturally sensitive methods, the result is a dramatic improvement in school performance. Public schools, unfortunately, too often require Hawaiian students to adjust to learning methods and behavior patterns that conflict with their own cultural traditions.

As a group, the programs authorized by S. 360 and discussed below have the potential to bring about a significant alteration in the educational status of the Native Hawaiian population. The Committee believes that only those programs which are provided in an atmosphere that is attentive to Hawaiian culture and traditions can assist Hawaiians to achieve parity in education and in other socioeconomic spheres.

Implementation of Model Curriculum: The Kamehameha Schools/Bernice Pauahi Bishop Estate (KS/BE) operates schools for Native Hawaiian children starting at the preschool level and going through high school. In conjunction with its mission to serve the educational needs of Hawaiian students, KS/BE has developed a reading program for elementary school children called the Kamehameha Elementary Education Program (KEEP), which has proven very effective in raising the reading scores of Hawaiian children who previously have scored below national norms. In the initial experiment that tested the KEEP curriculum, the children who participated for 3 years scored in the 50th reading percentile while a matched group of children who did not receive KEEP instruction scored at the 25th percentile.

The program stresses reading comprehension and utilizes teaching methods compatible with the learning styles of Hawaiian children. External evaluations by nationally recognized experts have confirmed the validity and success of KEEP.

In an effort to expand the program to reach more Native Hawaiian children, KS/BE has established the program in 6 public schools at a cost to KS/BE of nearly $1.5 million per year. Additionally, KS/BE continues to operate a Demonstration School where KEEP research is ongoing, with new curricula being regularly developed, tested and evaluated. The cost to KS/BE is $2 million per year.

Section 3 of S. 360 provides federal funds to further expand the KEEP program into the public schools of Hawaii. Under the provision, the program will be in place in 20 public schools by 1992, and KEEP will serve a total of 9,300 children, including 700 at the Kamehameha Elementary Demonstration School. The expansion and costs are detailed as follows:

1986-87: 6 schools; 2,000 children; $1,343,671; $560 per pupil.
1987-88: 8 schools; 2,500 children; $1,714,671; $672 per pupil.
1988-89: 10 schools; 3,500 children; $2,181,671; $623 per pupil.
1989-90: 12 schools; 4,500 children; $2,647,670; $588 per pupil.
1990-91: 14 schools; 5,867 children; $3,067,670; $523 per pupil.
1991-92: 17 schools; 7,233 children; $3,642,670; $504 per pupil.
1992-93: 20 schools; 8,600 children; $3,737,670; $435 per pupil.

Besides the need to continue ongoing research and evaluation, there is the need to continue training of teachers, both those now in the Hawaii public school system and those new teachers in training at the University of Hawaii. Section 3 of S. 360, therefore, provides for grants to the Hawaii Department of Education for in-service training, the University of Hawaii for new teacher training, and to the KS/BE for continued research and evaluation.

Family Based Preschool Centers: Attention to the critical period of a child's life from prenatal to kindergarten can help prevent long-term adverse social, health and education problems and, by involving the child's family, can significantly improve the outlook for the children's future successful educational progress. According to testimony, a recent unpublished dissertation found the underprepared Hawaiian students, when placed in classrooms where the traditions and practices associated with Hawaiian home values are present, show a significant positive change with respect to their attitudes toward education, learning, school officials, classmates, and themselves. Simply stated, the preventive thrust of family based preschool centers have proven to enhance the educational status of Native Hawaiian children.

Section 4 of S. 360 provides for direct grants to Hawaiian organizations to develop and operate 11 family-oriented preschool education centers throughout the Hawaiian Islands. These programs should have prenatal and preschool components and use a comprehensive approach to serving families and children who are at-risk. Involvement of education, health and social service agencies will be required in order to bring about real change within multi-risk families.

Higher Education: While Native Hawaiians make up 20 percent of the State's population, only 7 to 8 percent are enrolled overall at the University of Hawaii. This is very significant when compared to the Japanese, who make up 22 percent of the State's population but over 31 percent of the University's student body. At the Manoa campus, the only 4-year degree granting institution of the University system, Hawaiians make up only 4.6 percent of the student body, while Japanese students account for 36 percent of the enrollees. Thus, one objective of any approach to help Hawaiians to reach educational parity must be to increase the number of Hawaiians who attend and graduate from institutions of higher education.

Section 5 of S. 360 provides funding for a demonstration project designed to correct the underrepresentation of Hawaiians in higher education. The program will provide grants, based on need and academic potential, to Hawaiians enrolled in colleges and universities. It will also provide counseling and support services for these students, as well as counseling at the high school level for students who may be eligible for grant assistance.

Testimony indicated that only 35 percent of the Hawaiians enrolled at the University actually obtain a 4-year degree. The post-graduate statistics are even dimmer—only 3.9 percent of the post-graduate students at the Manoa campus are Native Hawaiians. Section 5(b) sets up a demonstration project for a post-graduate degree program that provides fellowship support in those professions where Native Hawaiians are underrepresented. Support will

be tied to loan reduction incentives when the recipient returns to work in the Native Hawaiian community.

Gifted and Talented: In the significant national study, "A Nation at Risk," the National Commission on Excellence in Education states that the federal government needs to assist in meeting the needs of gifted and talented students, a group which "includes both national resources and the Nation's youth who are most at risk." This group needs enriched curriculum beyond that of even other students of high ability. Only 6.8 percent of the identified gifted and talented students in Hawaii's public schools are Native Hawaiian.

Section 6 of S. 360 authorizes the Secretary of Education to establish a Native Hawaiian Gifted and Talented Center at the Hilo Campus of the University of Hawaii and to make project grants to the University and to Kamahemeha Schools. The demonstration projects will address the special needs of Native Hawaiian students who are gifted and talented. The projects will identify the educational, emotional and psychosocial needs of the students and their families and conduct activities designed to help meet those needs. Activities will specificially include use of the Native Hawaiian language and focus on Hawaiian traditions. The bill authorizes contracts with public television and the Children's Television Workshop (CTW) as an adjunct to these projects. A representative of CTW testified before the Committee in June, 1986, and described the efficacy of using CTW models as a tool for gifted and telented Native Hawaiian and Indian children who are at-risk.

The Committee recognizes the movement among Native Hawaiian groups to increase the use of the Native Hawaiian language and encourages such efforts. The most important element for preservation of any culture is the maintenance and development of its language. The bill thus provides that the Hawaiian language be taught in conjunction with programs funded by this bill. The teaching of the Hawaiian language as a second language and its use in appropriate Hawaiian cultural and history courses will help assure Hawaiian cultural integrity by increasing the number of people who speak fluent Hawaiian, of whom there are now estimated to be only 2,500.

The Committee notes that S. 150, introduced on January 6, 1987, by Senators Inouye and Matsunaga, would provide funds for demonstration projects to address the special needs of gifted and talented Indian and Native Hawaiian students. S. 360 now addresses this need for Native Hawaiian students and the Committee intends to seek a similar provision for American Indian and Alaska Native gifted and talented students when Title IV, the Indian Education Act, is reauthorized later this year.

Special Education: The NHEAP "Final Report" found that Native Hawaiian students are overrepresented in Special Education categories, particularly in the category of Learning Disabled where 35 percent of the students identified as LD students are Native Hawaiian. Section 7 of S. 360 provides grants to identify Native Hawaiian children having special education needs; to conduct educational activities designed to meet those needs; and to conduct related research.

The Committee received testimony indicating that Native Hawaiians teenage girls are more likely to become pregnant than young girls of other ethnic groups and that over 30 percent of all premature births in the state are Native Hawaiian, as are over 50 percent of all illegitimate births. Mothers of Native Hawaiian ancestry have the highest rates of birth with congenital defects, births under 1501 grams, and neonatal deaths.

These statistics may help explain why, in language development, for example, over 50 percent of the Hawaiian kindergarten children score in the first three stanines compared with the national norm of 23 percent. These low scores mean many Hawaiian children start school with a severe language impairment. Because early intervention has been shown to greatly improve later educational achievement for special education students, the Committee expects much of the focus of the grants approved under this section to be on prevention through early identification and establishment of preschool, family oriented programs. Additionally, the bill provides for further research to help determine why a disproportionate number of Hawaiian children are learning disabled.

Such research should include studies of the effects on Native Hawaiians of the loss of their culture over the last 200 years.

LEGISLATIVE HISTORY

95th Congress: Three bills were introduced in the 95th Congress: S. 857, to include Native Hawaiians in the Indian Education Act programs; S. 859, to extend the provisions of the Indian Self-Determination and Education Assistance Act to Native Hawaiians, and S. 860, to extend the Indian Financing Act to Native Hawaiians. Hearings were held in Hawaii on February 13, 14, and 15, 1978. The bills, sponsored by Senators Inouye and Matsunaga, provided the Select Committee with its first opportunity to assess Native Hawaiian issues.

96th Congress: Senators Inouye, Melcher and Matsunaga, introduced S. 916 on November 1, 1979. This was a free-standing bill to set up a pilot and demonstration program and to establish a formula program to fund public school programs to serve Native Hawaiians. The bill, which tracked the provisions of Title IV, the Indian Education Act, passed the Senate but the House chose instead to create a Commission to assess the educational needs of Native Hawaiians.

98th Congress: The Native Hawaiian Educational Assessment Project (NHEAP) was submitted to the Committee in March, 1984. The Committee held an oversight hearing on March 21, 1984, but took no further action on Hawaiian education in the 98th Congress.

99th Congress: Coming round once again to the idea of including Native Hawaiians in programs designed for Native Americans, Senators Inouye, Melcher and Matsunaga introduced S. 830, a bill to amend Title IV, the Indian Education Act. A Washington, D.C. hearing was held on June 12, 1986, but the Committee took no further action on the measure.

100th Congress: S. 360 was introduced on January 21, 1987 by Senators Inouye and Matsunaga. The Committee held a field hearing in Honolulu, Hawaii on March 6, 1987, when testimony was re-

ceived from various state, local, and private, nonprofit organizations. A companion bill, H.R. 1081, was introduced in the House by Representatives Akaka, Kildee and Saiki and referred to the Committee on Education and Labor.

COMMITTEE RECOMMENDATIONS AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on March 19, 1987, by a unanimous vote of a quorum present, recommends that the Senate pass S. 360, as amended. The amendment appears on page 1 of this report and is explained below.

EXPLANATION OF COMMITTEE AMENDMENT

The Committee adopted the recommendation of the University of Hawaii that the gifted and talented demonstration project authorized by section 6 of the bill be located at the Hilo campus of the University on the Big Island of Hawaii. Native Hawaiians make up the largest ethnic group of high school students on the Big Island and, with the current 51 percent Hawaiian birth rate, this population group will dominate the Island's schools in a few years. There are a variety of Hawaiian communities on the Big Island: some are rural where a variety of Hawaiian traditions are practiced; others are semi-urban with largely assimilated Hawaiian middle-class.

A gifted and talented program is in place at Waiakea High School in Hilo with an experienced staff. This will constitute a valuable resource for the demonstration project at the University. Additionally, Hilo High School is now a magnet school for the performing arts, attracting students gifted in those fields. Thus, the Committee believes the factors favoring location of the project at the Hilo campus are sufficient to revise section 6 of this bill, which originally left open the issue of where the project would be located.

Other testimony suggested an amendment to require annual progress reports for the programs authorized by the bill. The Committee does not believe bill language is necessary to accomplish this but does expect the Department of Education to provide periodic reports to the legislative and appropriations Committees of the House and Senate on the status of the programs and to make any needed recommendations for changes in the law to fulfill the purposes of the Act.

SECTION-BY-SECTION ANALYSIS OF S. 360, AS AMENDED

Section 1. Findings: The federal government has the power and the obligation to legislate for Native Hawaiians who have a critical need for educational success because of their disproportionate representation in negative educational statistical matters.

Section 2. Purpose: To authorize needed educational programs.

Section 3. 3(a) authorizes the Secretary of the Department of Education to make direct grants for implementation of Native Hawaiian model curriculum projects in public schools.

3(b) directs the Secretary to assure implementation in a minimum of twenty public schools by school year 1992-1993.

3(c) authorizes an appropriation of $3 million for fiscal year 1988 and such sums as may be necessary through fiscal year 1993.

Section 4. 4(a) directs the Secretary to make direct grants to Native Hawaiian organizations to develop and operate 11 family-based education centers throughout the state. Centers shall include parent-infant programs, preschool programs and a long-term follow-up and assessment program.

4(b) authorizes $2.4 million for FY 1988 and such sums as may be necessary through fiscal year 1993.

Section 5. 5(a) directs the Secretary to make grants to the Kamehameha Schools/Bernice Pauahi Bishop Estate for a demonstration program to provide higher education fellowship assistance to Native Hawaiian students.

5(b) directs the Secretary to make grants to the Kamehameha Schools/Bernice Pauahi Bishop Estate for a demonstration program to provide post-bachelor degree fellowship assistance to Native Hawaiian students.

5(c) directs that post-bachelor degree fellowships shall contain an enforceable contract obligation whereby recipients provide their professional services, either during their fellowship or upon completion, to the Native Hawaiian community within the State of Hawaii.

5(d) authorizes an appropriation of $1.25 million for two (2) and four (4) year degree fellowships and $.75 million for post-bachelor degree fellowships for fiscal year 1988 and each succeeding fiscal year through 1993.

Section 6. 6 (a) and (b) direct the Secretary to make grants for gifted and talented projects for Native Hawaiian elementary and secondary school students.

6(c) provides for dissemination of information.

6(d) authorizes an appropriation of $1 million for fiscal year 1988 and each succeeding fiscal year through 1993.

Section 7. 7(a) directs the Secretary to make grants to operate projects that address the special education needs of Native Hawaiian students.

7(b) authorizes an appropriation of $1.5 million for fiscal year 1988 and each succeeding fiscal year through 1993.

Section 8. 8(a) authorizes the Secretary to determine the information and form of applications for grants or contracts under this Act.

8(b) provides that the comments of each local educational agency serving students who will participate in the project for which assistance is sought, shall accompany an application.

Section 9. 9(1) defines "Native Hawaiian" to mean any individual who is a citizen of the United States, a resident of Hawaii, and a descendant of the aboriginal people, who prior to 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii; as evidenced by any of the following—genealogical records, Kupuna (elders) or Kama'aina (long-term community resident) verification, or birth records of the State of Hawaii.

9(2) defines "Secretary" to mean the Secretary of the Department of Education.

9(3) defines "Native Hawaiian Educational Organization" to mean a private nonprofit organization that serves the interests of Native Hawaiians, and is recognized by the Governor of Hawaii for

the purpose of planning, conducting or administering programs for the benefit of Native Hawaiians.

9(4) defines "Native Hawaiian Organization" to mean a private nonprofit organization that serves the interests of Native Hawaiians, and is recognized by the Governor of Hawaii for the purpose of planning, conducting, or administering programs for the benefit of Native Hawaiians.

9(5), 9(6), and (7) define the terms "elementary school", "local educational agency" and "secondary school" to have the same definitions as those used in the Elementary and Secondary Education Act.

COST AND BUDGETARY CONSIDERATIONS

The Cost estimate for S. 360, as amended, as evaluated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 24, 1987.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached estimate of the costs of S. 360, a bill to improve the education status of Native Hawaiians. The bill was ordered reported by the Senate Select Committee on Indian Affairs on March 19, 1987.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

EDWARD M. GRAMLICH,
Acting Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 360.
2. Bill title: None.
3. Bill status: As ordered reported from the Senate Select Committee on Indian Affairs, March 19, 1987.
4. Bill purpose: The purpose of this bill is to establish and authorize through 1993, five new federal grants to develop supplemental educational programs to benefit Native Hawaiians. These grants are subject to subsequent appropriations action.
5. Estimated cost to the Federal Government:

[By fiscal years, in millions of dollars]

	1988	1989	1990	1991	1992	1993
Estimated authorization levels:						
Model curriculum project	3.0	3.2	3.3	3.5	3.7	3.9
Family based education centers	2.4	2.5	2.7	2.8	3.0	3.1
Higher education	2.0	2.1	2.2	2.4	2.5	2.6
Gifted and talented	1.0	1.1	1.1	1.2	1.2	1.3
Special education	1.5	1.6	1.7	1.8	1.9	2.0
Total authorization levels	9.9	10.5	11.0	11.7	12.3	12.9
Estimated total outlays	4.4	9.1	10.6	11.2	11.9	12.5

The costs of this bill fall in Function 500.

Basis of estimate: The authorization levels for all five new grant programs in S. 360, a bill to improve the educational status of Native Hawaiians, are the levels specifically stated in the bill for 1988. The outyear levels are authorized at such sums as may be necessary. The estimates for 1989 through 1993 reflect the 1988 stated level adjusted for inflation in the outyears. The estimate assumes full appropriation of authorized levels at the beginning of the year. Estimated outlays reflect the spending pattern of current Indian education programs operated by the Department of Education.

6. Estimated cost to State and local government: All or parts of the grants for the model curriculum project, gifted and talented students, and special education, totalling $5.5 million in 1988, would be grants to the State of Hawaii. There are no federal matching requirements of these funds and up to 10 percent may be used to cover administrative costs.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Deborah Kalcevic.

10. Estimate approved by: C.G. Nuckols (for James L. Blum, Assistant Director for Budget Analysis).

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 360, as amended, will have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee received the following letter from the U.S. Department of Education giving the Administration's views of S. 360:

U.S. DEPARTMENT OF EDUCATION,
Washington, DC, March 18, 1987.

Hon. DANIEL K. INOUYE,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

I am writing in response to your request for the views of the Department of Education on S. 360, a bill "To improve the education status of Native Hawaiians, and for other purposes." The bill would authorize six new categorial education programs for Native Hawaiians through fiscal year 1993, with an authorization for fiscal year 1988 aggregating $9.9 million.

Mr. Chairman, while I remain sympathetic to the needs of Native Hawaiians, and share your faith in educational opportunity as a most effective means of addressing those needs, I must strongly oppose enactment of S. 360. First, I am opposed, as a matter of both principle and policy, to segmenting our Nation into increasingly narrow classes or categories of individuals and providing them with special treatment or benefits. Second, the bill is too

costly. The current critical need to reduce budget deficits, and the commitment of the Congress and the Administration to deficit reduction, as manifested in P.L. 99-177, make extreme caution necessary when considering new categorical programs such as these. Third, many of the activities that would be authorized by the bill are already authorized under other programs of the Department, including Chapters 1 and 2 of the Education Consolidation and Improvement Act, the Education of the Handicapped Act, and Title II of the Education for Economic Security Act. In addition, Native Hawaiian students are already eligible to participate in the various programs of student financial assistance administered by the Department under Title IV of the Higher Education Act of 1965, as amended.

I also must object to the bill for administrative reasons. The Department's experience in administering the separate programs for native Hawaiians under the Carl D. Perkins Vocational Education Act, the Library Services and Construction Act, and the Drug-Free Schools and Communities Act is not promising. We have found that they consume an inordinate amount of the Department's administrative resources and that recipients have not always been able to use the funds available on a timely basis. Moreover, I object to the provisions of the bill that would direct funding to certain recipients. The Department remains committed to selecting the recipients of Federal assistance on a competitive basis. Selecting recipients competitively helps to ensure that the taxpayer's funds are spent only on projects that have the greatest promise of success in meeting the objectives of our programs.

The Office of Management and Budget advises that there is no objection to submission of this report to the Congress from the standpoint of the Administration's program.

Sincerely,

WILLIAM J. BENNETT.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that there are no changes in existing law made by S. 360.

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